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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RACHEL B.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062353

(San Diego County
Super. Ct. No. EJ3169C)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code
section 366.26 hearing. Gary M. Bubis, Judge. Petition denied. Request for stay denied.

Rachel B. contends that the juvenile court abused its discretion when it set a hearing under Welfare and Institutions Code¹ section 366.26 to select and implement a permanency plan for her son, T.H., rather than extending family reunification services to the 18-month review date. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Rachel B. and Cedric H. are the parents of C.H., F.H., and T.H., who are now seven years old, four years old and 19 months old, respectively. This proceeding concerns only T.H.,² who was declared a dependent of the juvenile court in April 2011 due to domestic violence between Rachel and Cedric.

The parents' history of domestic violence and child protective interventions include the following documented incidents. In April 2006, Cedric pushed Rachel. Rachel did not want Cedric to be prosecuted. In December 2008, police were called to the family home four times on reports of domestic disturbances. In March 2009, police came to the home after Rachel reported that Cedric tried to hit her with a knife. In July 2009, Rachel and Cedric were pulling in opposite directions on C.H.'s limbs in a "tug-of-war" in the presence of a police officer. Rachel told the police officer that Cedric had been beating her. The police officer arrested Cedric and detained C.H. and F.H. in

¹ Unless specified, statutory references are to the Welfare and Institutions Code.

² C.H. and F.H. were placed in protective custody in December 2009 and were subsequently adjudicated to be dependents of the juvenile court. Rachel and Cedric failed to complete their family reunification case plan and the court terminated their parental rights to C.H. and F.H.

protective custody. C.H., who was then four years old, had multiple scars on his body, including a scar on the left side of his chest, clusters of dark scars under his arms, a linear scar across his buttocks and a crescent-shaped scar on his back. C.H. said that his father hit him with a belt. The San Diego County Health and Human Services Agency (Agency) concluded that C.H. was at substantial risk of physical abuse, but C.H. and F.A. were returned to the parents' care under a voluntary service plan. In October 2009, Cedric hit Rachel in the temple, pushed and shoved her into a wall and threatened her with a wire hanger pointed at her face. Cedric was arrested. The children were present during the altercation. C.H. was scared and was crying.

T.H. was born in February 2011. He was three months premature and was placed in neonatal intensive care. Approximately one week after T.H.'s birth, the social worker in C.H.'s and F.H.'s cases noticed that Rachel's right eye was bruised and swollen. She had another bruise near her eyebrow. Rachel claimed that the medication she had received at the hospital made her eyes itch and that she had rubbed her eye and made it puffy. She also claimed that she had fallen off a cot and injured her eye. Rachel later denied having said that she had fallen off a cot and explained that she had been bitten by "something" and had scratched the bitten area, leaving a mark. She claimed that the swelling to her right eye was due to medication. Rachel and Cedric denied that Rachel's injury was caused by domestic violence.

On March 17, 2011, the Agency initiated dependency proceedings under section 300, subdivision (b). The court sustained the petition, removed T.H. from parental custody and ordered a family reunification case plan. Rachel's case plan required that she

attend individual therapy with an emphasis on domestic violence counseling, and conjoint counseling with Cedric, when appropriate. Cedric was required to attend a 52-week domestic violence treatment program.

When T.H. was released from hospital care, the Agency placed him in foster care with C.H.'s and F.H.'s prospective adoptive parent. T.H. was growing and was otherwise doing well.

Rachel and Cedric visited T.H. together once a week. They were very affectionate with him. In August, the social worker allowed the parents to visit T.H. at the visitation center without strict supervision. The parents refused the Agency's offer to increase their visitation, stating that they had to work.

The parents claimed that the last incident of domestic violence between them had occurred in 2009. They minimized the severity of previous incidents of domestic violence between them and continued to blame the Agency for having removed their children from their care. The social worker reported that Cedric was consistently angry and argumentative. The social worker asked Rachel if she was willing to work toward reunifying with T.H. separately. Rachel refused to do so. She said that she and Cedric were going to continue their relationship and that they would reunify with T.H. together.

In November, at the six-month review hearing, the Agency recommended that the parents' case plans include a parenting education program, and that the parents develop a support system that they could use when their relationship was stressed. The court ordered the Agency to provide short, unsupervised visitation to the parents.

The contested 12-month review hearing was held on May 22 and 23, and July 11, 2012. The court admitted the Agency's reports in evidence and heard testimony from social workers Karen Lowrimore and Wanjiru Golly,³ and Rachel and Cedric. The court took judicial notice of the dependency case files of the older siblings.

Lowrimore testified that she was assigned to the case in March 2012. There had not been any incidents of domestic violence between the parents since February 2011. Rachel had completed individual therapy and parenting classes, and had met her protective goals. Her visits with T.H. were unsupervised. Cedric had participated in only 24 of 52 sessions of a domestic violence treatment program since enrolling in the program more than a year earlier. Because of Cedric's minimal participation in services, Lowrimore viewed Cedric as an untreated perpetrator of domestic violence. The parents had not begun conjoint therapy because Cedric had not completed his treatment program. Rachel did not intend to separate from Cedric.

Lowrimore reported that the parents' neighbor, N.A., had obtained a restraining order against Cedric in December 2011. N.A. said that Cedric threw a drink on her and had to be physically restrained from attacking her. By the time police arrived, Cedric had left. The next day, Cedric returned and told N.A., "I am going to mess you up bad and I have a gun." The restraining order was served on Cedric in late December.

3 Golly testified primarily about problems with visitation, which was an issue at trial but is not relevant to the issues raised on appeal. For that reason, we do not summarize her testimony here.

Rachel testified that she never had any problems with Cedric. She maintained that he had never hurt her or pushed her. She claimed that she did not have a black eye in February 2011. Rather, she stated that her face was swollen because she just had a baby. Rachel did not know the expression "cycle of violence." Rachel said that if T.H. were returned to her care, she would want to be a family with Cedric.

Cedric testified that there had never been any incidents of domestic violence between him and Rachel. He stated that they had arguments and that the police were called. He claimed that he had never hit Rachel and that he had never gone to jail. Cedric said he and Rachel had a good, family-oriented relationship.

The court found that Rachel had clearly made substantive progress with her case plan. The court noted that if Rachel were living by herself, the social worker was willing to return T.H. to her care. However, Rachel and Cedric were in "total denial" about their history of domestic violence. Rachel denied any domestic violence, and Cedric had not completed his treatment program and was not ready for conjoint therapy. The court found that returning T.H. to the parents' care would create a substantial risk of detriment to T.H. and that there was not a substantial probability that he would be returned to their care by the 18-month review date, which was in approximately two months. The court set a section 366.26 hearing for November 6, 2012.

Rachel petitions for review of the juvenile court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) She asks this court to remand the matter with directions to the juvenile court to vacate the section 366.26 hearing and order that additional family

reunification services be provided to her. This court issued an order to show cause, the Agency responded, and the parties waived oral argument.

DISCUSSION

A

The Parties' Contentions

Rachel contends that in view of the court's finding that she made substantive progress with her case plan, the court erred when it did not extend family reunification services to the 18-month review date. She argues that there is no substantial evidence to support a finding that there was not a substantial probability that T.H. would be returned to her care by the 18-month review date.

B

Legal Principles and Standard of Review

When a child is removed from parental custody, unless specified exceptions apply, the juvenile court must order family child welfare services for the child and the parent to facilitate family reunification. (§ 361.5, subds. (a), (b).) For a child who is under three years of age on the date of the initial removal from parental custody, as here, reunification services are presumptively limited to six months, and may be provided "no longer than 12 months from the date the child entered foster care." (§ 361.5, subd. (a)(1)(B).)

At the 12-month review hearing, if the child is not returned to parental custody, the juvenile court has the discretion to continue the case to the 18-month review date, set a section 366.26 hearing, or order a permanent plan of long-term foster care for the child.

(§ 366.21, subds. (g)(1), (2) & (3).) Section 361.5, subdivision (a)(3), provides that "court-ordered services may be extended up to a maximum time period not to exceed 18 months" after the child was originally removed from parental custody if the juvenile court finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent and safely maintained in the home within the extended period of time, or that reasonable services have not been provided to the parent. (§§ 361.5, subd. (a)(3); 366.21, subd. (g)(1).)

To find a substantial probability that the child will be returned to parental custody and safely maintained in the home, the juvenile court is required to find all of the following:

"(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

"(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

"(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.21, subd. (g)(1).)

The reviewing court must affirm an order setting a section 366.26 hearing if it is supported by substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination."

(Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874; Elijah R. v. Superior Court (1998) 66 Cal.App.4th 965, 969.)

C

There Is Substantial Evidence to Support the Juvenile Court's Findings Under Section 366.21, Subdivision (g)(1)

Rachel acknowledges that in order to extend family reunification services to the parent's care by the 18-month review date, the court must find that all three prongs of the test under section 366.21, subdivision (g), have been met. Rachel argues that the juvenile court abused its discretion when it relied on her testimony at the 12-month review hearing to discredit the progress she had made throughout the case. She contends that her testimony does not constitute substantial evidence to support the finding that there was not a substantial probability of return by the 18-month review date.

The record shows that Rachel met the first two prongs of section 366.21, subdivision (g). She consistently and regularly visited T.H., and made significant progress addressing the problems that led to his removal from her care. (§ 366.21, subd. (g)(1)(A), (B).) However, there is substantial evidence to support the finding that Rachel did not demonstrate the capacity and ability both to complete the objectives of her treatment plan and to provide for T.H.'s safety, protection, physical and emotional well-being, and special needs. (§ 366.21, subd. (g)(1)(C).)

Rachel was adamant about maintaining her relationship with Cedric. She denied that he had ever assaulted or mistreated her. Cedric denied having mistreated Rachel. Yet the record documents incidents of Cedric's assaultive behaviors from 2006 to 2011.

The record also supports a finding that Cedric hit his four-year-old son with a belt, leaving scars. In addition, a neighbor found it necessary to secure a restraining order against Cedric in December 2011.

In view of Rachel's insistence that Cedric remain in the home, the court could reasonably conclude that Rachel did not demonstrate the capacity and ability both to meet the objectives of her treatment plan and to provide for T.H.'s safety, protection, physical and emotional well-being, and special needs. (§ 366.21, subd. (g)(1)(C).) Cedric was offered or provided appropriate treatment services from October 2009 to July 2012, but failed to make any substantive progress in mitigating the problems that led to the removal of all of his children from the home. Social Worker Lowrimore characterized Cedric as an untreated perpetrator of domestic violence. Even if Cedric were ready to engage in conjoint therapy, which he was not, the record supports the reasonable inference that he and Rachel could not meet the objectives of their treatment plan in the two months remaining before the 18-month review date.

In views of Cedric's lack of progress with his court-ordered treatment plan, Rachel had a choice. She could safely care for T.H. in her home, by herself, or she could remain with the man who had hit and slapped her, pushed her into a wall, threatened her with a knife, broke down a bathroom door where she had taken refuge, held a wire hanger to her face, hit her four-year-old son with a belt, and hit her in the face shortly after she had given birth to T.H. Rachel chose to remain in an abusive situation. Despite her earlier reports to police and social workers, Rachel insisted that Cedric had never abused her and that the facts underlying the children's dependency petitions were false.

Contrary to Rachel's argument, the juvenile court acted within its discretion when it determined that Rachel's testimony denying any domestic violence diminished the reliability of the reports of her progress in understanding the dynamics of domestic violence. The trial court is the finder of fact; the reviewing court does not reevaluate the credibility of witnesses, resolve conflicts in the evidence or evaluate the weight of the evidence. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) After approximately 16 months of services, Rachel failed to recognize that she was a victim of abuse and insisted on remaining in a committed relationship with her abuser. Based on this evidence, the juvenile court could reasonably have concluded that Rachel did not demonstrate the ability to complete the objectives of her case plan and provide for T.H.'s health, safety, and physical and emotional well-being. (§ 366.21, subd. (g)(1)(C).) The record supports the juvenile court's finding that there was no substantial probability of safely returning T.H. to Rachel's care by the 18-month review date.

DISPOSITION

The petition is denied. The request for stay is denied.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.